No.....

Supreme Court of the United States

OCTOBER TERM, 1943

In the Matter of the Petition of NEW ENGLAND FISH COMPANY OF OREGON, a Corporation, Owner, and NEW ENGLAND FISH COMPANY, a Corporation, Charterer, of the American Diesel Fishing Tender O. M. ARNOLD For Limitation of Liability.

NEW ENGLAND FISH COMPANY OF OREGON, a Corporation, and NEW ENGLAND FISH COMPANY, a Corporation,

Petitioners,

vs.

MARGARET MEYER, Administratrix of the Estate of ERNEST KRUSE, Deceased, Estate of ANDREW LEE, Deceased, Estate of GEORGE LEE, Deceased,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF THE COURTS BELOW

The opinion and dissenting opinion of the circuit court of appeals for the ninth circuit (R. 62), are reported as *Meyer v. New England Fish Co. of Oregon, et al.*, 136 F. (2d) 315. The opinion of the circuit court of appeals for the ninth circuit on the appeal previously taken in this matter is reported as *The O. M. Arnold*, 127 F. (2d) 648, cert. den. sub nom. *Kruse v. New England Fish Company of Oregon*, ... U. S. ...., 87 L. ed. (Adv. Op.) 49. (App. i). There are no reported decisions of the district court in this matter.

II. JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. 43 Stat. 938, Title 28 U. S. C. § 347(a).

III. STATEMENT OF THE CASE

The statement of the matter involved as set forth in the petition (p. 1) is believed sufficient and is here adopted in the interest of brevity.

IV. SPECIFICATION OF ERRORS

The circuit court of appeals for the ninth circuit erred in the following particulars:

1. In holding that respondent's claim presented in the limitation proceeding after the expiration of the time fixed by the monition issued pursuant to Admiralty Rule 51 should be permitted to be filed either (a) *nunc pro tunc* as of the time fixed by the monition for the filing of claims, or (b) as of the date when presented.

2. In holding that it had power to review an order of the district court refusing to permit the filing of late claims in a limitation proceeding.

3. In substituting its discretion for that of the district court in determining whether late claims should be permitted to be filed in a limitation proceeding.

4. In reversing the decree of the district court.

V. ARGUMENT

Summary of Argument

Admiralty Rule 51 confers upon the district courts final and conclusive power to fix the time for filing claims in a limitation proceeding at any time not less than thirty days from the issuing of the monition and any time so fixed can be neither arbitrary nor capricious. The circuit court of appeals has no power either to fix or extend the time for filing claims and has no power to review an order of the district court refusing to permit the filing of late claims.

The district court has discretion to grant or withhold permission to file late claims and if, contrary to the contention here made, the circuit court of appeals has power to review an order of the district court refusing permission to file late claims such review is limited to correcting an abuse of discretion by the district court.

The district court herein carefully exercised its discretion and the court below did not find that the district court had abused its discretion in refusing respondent permission to file late claim. Nor was the district court required as a matter of law to permit the filing of respondent's late claim. Respondent's claim could not be filed *nunc pro tunc* as of the expiration date of the monition since no qualified personal representative was in existence at that time. Also the district court could not be required to permit the filing of respondent's claim by virtue of the former decision of the court below in *The O. M. Arnold*, 127 F. (2d) 648. At best this decision was one of the circumstances to be considered by the district court in exercising its discretion in granting or refusing respondent leave to file her claim. The beneficial

claimants and their counsel here voluntarily elected to rest their rights on the claims previously filed by them through foreign administrators with full knowledge of the consequences. They are not now entitled as a matter of law to permission to file late claims.

By reversing the decree of the district court, the court below plainly substituted its discretion for that of the district court. This, it had no power to do. At most, the court below was limited to reviewing the action of the district court for an abuse of discretion.

A. The time fixed by the district court pursuant to Admiralty Rule 51 for filing claims in a limitation proceeding is final and conclusive and the circuit court of appeals has no power to review an order of the district court refusing to permit the filing of late claims.

The time for filing claims, limited to March 25, 1940, and thereafter extended to November 15, 1940, was fixed by the monition issued by the district court pursuant to Admiralty Rule 51, which provides that on the filing of the petition the district court *"shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the said court and file their respective claims at or before a certain time to be named in said writ, not less than* 30 *days from the issuing of the same* * * *."

Authority to enact the General Admiralty Rules is conferred upon this Court by Revised Statutes §§ 913 and 917, Title 28 U. S. C. §§ 723, 730, these sections being derived from the Act of August 23, 1842, as amended, 5 Stat. 516 (2 *Benedict on Admiralty*, 6th ed., 1940, 2, 28).

It has been repeatedly held that by these enactments Congress has vested in this Court the complete power to regulate the whole subject of process and proceedings in admiralty. *Meyer v. Tupper,* 1 Black (66 U. S.) 522, 528, 17 L. ed 180, 183; *Ward v. Chamberlain,* 2 Black (67 U. S.) 430, 436, 17 L. ed. 319, 323; *The Princess Sophia,* (W. D. Wash. 1920) 269 Fed. 651, 654; *Hanson v. Fowle,* (D. C. Ore. 1871) Fed. Cas. No. 6041, 11 Fed. Cas. 465, 467; *Gaines v. Travis,* (S. D. N. Y. 1849) Fed. Cas. No. 5180, 9 Fed. Cas. 1062, 1065.

It is, of course, recognized that the power of this Court to promulgate rules in admiralty does not authorize alteration of substantive law (see *Washington-Southern Navigation Company v. Baltimore & Philadelphia Steamboat Company,* 263 U. S. 629, 635, 68 L. ed. 480, 483; *Ex parte Phoenix Insurance Company,* 118 U. S. 610, 623, 30 L. ed. 274, 279) but in matters of practice and procedure the Admiralty Rules promulgated by this Court have the full force and effect of statute. *The Sabine,* 101 U. S. 384, 388, 25 L. ed. 982, 984; *The El Sol,* (S. D. N. Y. 1930) 45 F. (2d) 852, 856; *United States v.* 1590 *Cases of Tomato Pulp,* (E. D. Pa. 1919) 255 Fed. 228, 229; *Scott v. The Young America,* (D. C. Mich. 1856) Fed. Cas. No. 12550, 21 Fed. Cas. 853, 854. As stated in *Bailey v. Sundberg,* (C. C. A. 2, 1892) 49 Fed. 583, 585: "The rule has the effect of a law of Congress." Likewise the rules and orders of the district court issued pursuant to the General Admiralty Rules have the full force and effect of law. *Criscuolo v. Atlas Imperial Diesel Engine Co.* (C. C. A. 9, 1936) 84 F. (2d) 273.

Likewise it is clearly established that proceedings under the Limitation of Liability Act of March 3, 1851 (Rev. Stat. §§ 4283, et seq., Title 46 U. S. C. §§ 183, et seq.) are properly governed by the General Admiralty Rules promulgated by this Court. *Providence and New York Steamship Company v. Hill Manufacturing Company,* 109 U. S. 578, 27 L. ed. 1038; see also *In re Providence & N. Y. Steamship Co.,* (S.D.N.Y. 1872) Fed. Cas. No. 11,451, 20 Fed. Cas. 16, 19.

Admiralty Rule 51 vests in the district court the power to fix the time for the filing of claims in the limitation proceeding. The sole limitation in this connection is that the time fixed be not less than thirty days from the issuing of the monition and, we submit, an error of law in this respect is the only question reviewable in the circuit court of appeals. Neither is it provided that extensions of the time are to be granted in the discretion of the district court nor is there provided any review in the circuit court of appeals or elsewhere. The power conferred by Admiralty Rule 51 upon the district court to fix the time for filing claims at any time after the expiration of thirty days from the issuing of the monition is sole and absolute. The circuit courts of appeals possess appellate jurisdiction only (Judicial Code §128, Title 28 U.S.C. §225; see *United States v. Moy Yee* Tai, (C.C.A. 2, 1901) 109 Fed. 1; see also Marker, *Federal Appellate Jurisdiction and Procedure,* §34) and neither in Admiralty Rule 51 nor elsewhere is there given to the circuit courts of appeals any power whatsoever with respect to the fixing of the time within which claims must be filed in a limitation proceeding. Judge Haney, dissenting in the court below (R. 64, 65), has stated that which we submit is the necessary construction of Admiralty Rule 51, as follows:

> "Second. The majority have undertaken something which I believe it has no power to do. Rule 51 of the Admiralty Rules promulgated by the Supreme Court of the United States empowers only the District Courts to issue monitions fixing the time within which claims might be filed. That time had expired long before the first appeal was taken. The majority now say 'there was no sufficient reason for denying these dependent heirs an opportunity to establish their case.' It would appear to me that Rule 51 and the monition issued herein are potent reasons for the entry of the decree appealed from. By its present decision the majority are usurping a power lodged by the Supreme Court only in the District Courts."

We submit that the view that the action of the district court in fixing or extending the time within which to file claims in a limitation proceeding is subject to review by the circuit court of appeals, disregards the nature and function of the power conferred upon the district courts by Admiralty Rule 51.

Basically, the exercise of power by the trial court over practice and procedure, irrespective of whether the same be in admiralty or otherwise and irrespective of whether or not the control takes the form of time limitations, may be either (a) limited by positive law and thereby subject to review by an appellate tribunal; (b) limited to the exercise of sound discretion and thus subject to appellate review for an abuse thereof; or (c) final and conclusive.

(a) Insofar as Admiralty Rule 51 limits the district court in fixing the time to file claims to not less than thirty days after the issuing of the monition, the exercise of power in this regard by the district court is limited by positive law

and any violation of this limitation would obviously be subject to review by the circuit court of appeals.

Other examples may be cited. In *Wainer v. United States,* (C.C.A. 7, 1937) 87 F. (2d) 77, 79, the trial court had entered an order extending the time for filing bill of exceptions on appeal, which order was entered more than thirty days after the date of the appeal. The circuit court of appeals pointed out that Rule 9 of the Supreme Court Rules governing criminal procedure provided that the bill of exceptions was to be filed within thirty days after taking the appeal or "within such further time as within said period of thirty days may be fixed by the trial judge," and stated:

> "In the rules the Supreme Court has substituted for the trial term a period of thirty days, and orders entered after the expiration of that time are beyond the jurisdiction of the court. Hence, the order of November 10th extending the time for filing bill of exceptions to December 15th was void and ineffectual because beyond the court's jurisdiction."

Similarly in *Burke v. Canfield,* (App. D.C. 1940) 111 F. (2d) 526, the court pointed out that the power of the district court to extend the time to file record on appeal is limited by Rule 73(g), Rules of Civil Procedure, to extensions granted before the expiration of the period for filing and docketing as originally prescribed, or as extended by a previous order. See also *Anderson v. Brady,* (D. C. Ky. 1941) 1 F. R. D. 589, and compare *Alaska Packers Association v. Pillsbury,* 301 U. S. 174, 81 L. ed. 988, where this Court held that the circuit court of appeals for the ninth circuit was powerless to provide by rule that an appeal might be taken in admiralty by simply serving and filing a

notice of appeal in the face of a Congressional enactment that an application for review must be made.

(b) In the exercise of certain powers over practice and procedure before it, the district court is limited by the grant of power to it (pursuant to court rule or otherwise) to the taking of certain steps in the exercise of its discretion. A litigant has therefore the right to the exercise of sound discretion by the district court in its acting or refusing to act pursuant to the granted power, and review of an abuse of such discretion will lie in the circuit court of appeals. Thus, in *Johnston v. Ouachita Nat. Bank of Monroe, La.*, (C. C. A. 8, 1930) 40 F. (2d) 604, 605, the defendant sought leave on the date of trial to file an amendment to the answer. The refusal of the trial court to permit the amendment was affirmed, the court stating:

> " * * *. Under Rule 19 of the New Equity Rules (28 USCA § 723), amendment of pleadings may be allowed in the discretion of the court, but subject to review in the case of abuse of discretion. (Cases cited.) We find no abuse of discretion in the instant case."

Also in *McMullin v. Sheehan,* (C. C. A. 8, 1938) 95 F. (2d) 129, 130, the court rule by which the trial court was bound (see *Drew v. Hogan,* 26 App. Cas. (D. C.) 55, 62, 6 Ann. Cas. 589, 591) required any amended pleading to be filed within ten days of an order of dismissal unless for good cause further time should be given by the court. In affirming the district court's refusal to allow the filing of an amended pleading the court states:

> " * * *. As the amended pleading had not been attacked by defendant, the action of the court in striking

> it was simply a refusal to permit amendment so long out of time. In the absence of any good cause for the delay, it cannot be held that there was any abuse of discretion in the refusal to permit the amendment."

Similarly, Admiralty Rules 28 and 39 provide that the district court, *in its discretion* may open default decrees (see discussion, infra, pp. 17-18). Research of counsel has revealed no case where the opening or refusal to open a default order or decree by the district court has been reversed by the circuit court of appeals as an abuse of discretion and, despite the language in the decided cases and the grant of power to the district court in terms of its discretion, it may well be considered that the power of the district court to open default orders or decrees is final and conclusive and not reviewable on appeal.

In other cases the matters in question would appear to be subject to the final and conclusive action of the court below although the opinions of the appellate tribunal are couched in terms of abuse of discretion by the lower court. In *Missouri, K. & T. Ry. Co. v. Kidd,* (C. C. A. 8, 1906) 146 Fed. 499, 500, the circuit court of appeals sustained the action of a lower appellate tribunal in dismissing an appeal before that court for failure to comply with its rule for the time of filing briefs, stating:

> " * * * . When rules of the latter character are disregarded it is discretionary with the court whether it will enforce the prescribed penalty and in the absence of a gross abuse of such discretion an order of the court in the premises will be respected on appeal or writ of error.
>
> " * * * .
>
> "The railway company did not file its brief until nearly three years had elapsed after the time fixed there-

> for by the standing rule and the order of the court. We cannot say, therefore, that in dismissing the appeal the court was not exercising a sound discretion. * * *."

In sustaining the dismissal of a cause in the lower court for want of prosecution pursuant to the district court rule that "all cases pending in this Court for more than one year without any proceeding of record having been taken, may be dismissed by the Court on its own motion for want of prosecution," the circuit court of appeals for the ninth circuit in *Hicks v. Bekins Moving & Storage Co.*, (C. C. A. 9, 1940) 115 F. (2d) 406, 408, states:

> "Fundamentally, but two questions are presented: (1) Did the lower court have the power to enter such an order of dismissal; and (2) if so, was there an abuse of discretion."

For a similar treatment of the power of the district court to non pros. a case for lack of due prosecution, see *Republic Acceptance Corporation v. Massachusetts Bonding & Ins. Co.*, (C. C. A. 3, 1929) 34 F. (2d) 660; cf. *Nealon v. Davis*, (App. D. C. 1927) 18 F. (2d) 175.

(c) The exercise of power by the district court over certain matters of practice and procedure is final and conclusive and not subject to review by the circuit court of appeals. In *Galveston Dry Dock & Construction Co. v. Standard Dredging Co.*, (C. C. A. 2, 1930) 40 F. (2d) 442, 444, the Southern District of New York in its local admiralty rules promulgated pursuant to Supreme Court Admiralty Rule 44 and Revised Statutes § 918, Title 28 U.S.C. § 731, had provided that a libelant should be entitled to an immediate decree for any amount which on the pleadings appeared to be presently due. The circuit court of appeals for the sec-

ond circuit held that this exercise of power over the admiralty practice and procedure was limited only by statutory enactment or action by this Court and was not reviewable by the circuit court of appeals. That court, speaking through Judge Learned Hand, stated:

> "The power of the District Court under section 731 of title 28 of the Code (28 USCA § 731) in general to make rules for its own procedure, earlier in origin, but somewhat more limited in expression than that given the Supreme Court in equity and the admiralty under section 730 (28 USCA), is perhaps in substance no less, though subject to the action of the higher court. Within its scope it is unquestionably valid and has been long exercised not only at common law * * * but in the admiralty. * * * . The Forty-fourth Admiralty Rule of the Supreme Court (28 USCA § 723) confirms it, and the respondent does not indeed dispute it. The argument is that it cannot be used to 'overrule' decisions of the Supreme Court or this court which have declared the pre-existing practice. This misconceives the office of a rule, which, while usually the codification of existing procedure * * * is not so confined. It is the result of the exercise of a power to legislate, delegated by Congress, though circumscribed by the statute which gives it, and by anything contained in the general laws, or the Supreme Court rules, as the statute itself declares. Within these limits the District Court may disregard existing practice as freely as Congress itself; *its action has the force of law * * * , and we are as much bound to observe it as a statute.*"

We submit that this decision and the opinion of the court below in the case at bar creates a conflict of the decisions in the circuit courts of appeals as to the reviewability in the circuit courts of appeals of the exercise by the district court of powers conferred upon it by the Supreme Court Admiralty Rules.

An analogous situation to that here presented was considered in *Manhattan Life Insurance Company v. Francisco,* 17 Wall (84 U.S.) 672, 679, 21 L.ed. 698, 700, where the lower court had refused to give certain instructions which were not requested in writing before argument as provided in the rules of court. This court stated:

> "* * *. No doubt a court may, notwithstanding the rule, in its discretion, receive prayers for instructions even after the general charge has been given to the jury, but neither party can claim as a right a disregard of the ordinary rules of practice in the court. There is nothing inconsistent with this to be found in the case cited. *People v. Williams,* 32 Cal. 280. On the contrary, whether a court shall enforce such a rule, or depart from it, is treated in that case as a matter resting in the discretion of the court."

Likewise, we believe, respondent cannot insist as a right a disregard of the time fixed by the district court pursuant to Admiralty Rule 51 for filing claims.

Admiralty Rule 51 vests in the district court final and conclusive power in fixing the time for filing claims and we submit that the power usurped by the decision of the circuit court of appeals herein is no more authorized than was the attempt of that court to disregard Congressional enactment in *Alaska Packers Association v. Pillsbury,* 301 U.S. 174, 81 L.ed. 988.

B. The circuit court of appeals erroneously construed Admiralty Rule 51 as conferring upon it power to substitute its discretion for that of the district court in refusing to permit the filing of late claims in a limitation proceeding.

Admiralty Rule 51 by its terms confers discretionary power upon the district courts to fix the time for filing claims. This

has been held to imply discretion to permit the filing of late claims presented after the time fixed by the monition. *The Argus,* (D. C. Mass. 1900) 100 Fed. 143, 144; accord: *The City of Boston,* (D. C. Mass. 1906) 159 Fed. 257, 259; *In re Eastern Dredging Co.,* (D. C. Mass. 1907) 159 Fed. 549, 551. In *The Argus* it is said:

> "The passengers in this case, by failing to appear and prove their claims, were in default, if not within the letter of admiralty rule 29, yet within its analogy. I am of opinion, therefore, that this court has authority, upon a proper showing to admit claims presented subsequent to the return day of the monition."

By its reversal of the decree of the district court the circuit court of appeals *of necessity* either (a) found that the district court had abused its discretion in refusing to permit the filing of the late claim of the respondent, or (b) substituted its discretion for the discretion of the district court on appeal.

1. Admiralty Rule 51 confers discretionary power upon the district court to permit the filing of late claims which, if reviewable, is reviewable only for an abuse of discretion.

(a) *The district court has discretion to permit the filing of late claims.*

The court below did not nor on the record could it have reversed the decree of the trial court for an abuse of discretion. The record on this appeal and the opinion of which review is here sought permit of only one conclusion—the circuit court of appeals plainly substituted its discretion for that of the district court. And in so doing we submit that the

majority of the court below, as stated by the dissenting judge, "are usurping a power lodged by the Supreme Court only in the District Courts" (R. 66).

Admiralty Rule 51 vests no such power in the circuit court of appeals to substitute its discretion for that of the district court. By its construction of this rule, the court below has established a rule of law at variance with that prevailing in other circuits and at variance with every decided case. In *The Argus,* (D. C. Mass. 1900) 100 Fed. 143 and *The City of Boston,* (D. C. Mass. 1906) 159 Fed. 257, the district court held that it had the discretion to permit the filing of late claims and the rule of the latter decision was tacitly approved on appeal by the circuit court of appeals for the first circuit in *Davenport v. Winnisimmet Co.,* (C.C.A. 1, 1908) 162 Fed. 862. *In re Eastern Dredging Co.,* (D. C. Mass. 1907) 159 Fed. 549, 551, 182 Fed. 179, 181 held that the same district court had discretion to refuse to permit the filing of late claims, this point apparently not being considered on the appeal in the proceedings. (See *Eastern Dredging Co. v. Winnisimmet Co.,* (C.C.A. 1, 1908) 162 Fed. 860).

In every case revealed by research of counsel which has considered the question of filing late claims in a limitation proceeding, it has been held that granting or withholding leave to file such claims rests in the discretion of the trial court. See *The Mandu,* (E.D. N.Y. 1937) 20 F. Supp. 820, 824; 102 F. (2d) 459, 462 (C. C. A. 2, 1939); *In re Agwi Nav. Co.,* (S.D. N.Y. 1936) 17 F. Supp. 973, aff'd. 89 F. (2d) 11 (C.C.A. 2, 1937); *The Navemar,* (E.D. N.Y. 1942) 49 F. Supp. 68, 71; see also *The Sandgate Castle,* (S.D. N.Y. 1940) 35 F. Supp. 458, 460. We are not here

concerned with a consideration of the merits of late claims presented (compare *In re Agwi Nav. Co.,* (C.C.A. 2, 1937) 89 F. (2d) 11, 12; *The Mandu,* (C.C.A. 2, 1939) 102 F. (2d) 459, 462) but only with the granting or withholding of the right to file in the limitation proceeding and we submit that Admiralty Rule 51 confers upon the district court and not the circuit court of appeals the discretion to permit or refuse such filing. The significance of this proposition and of the opinion of the court below is disclosed by the fact that research of counsel has disclosed no other case where the district court's granting or refusing to grant leave to file late claims has been reversed by a circuit court of appeals.

(b) *The exercise of a discretionary power may only be reviewed for an abuse of discretion.*

It is established law that action of the district court in admiralty on matters within its discretion will not be disturbed unless its action clearly amounts to an abuse of discretion. *Charter Shipping Co. v. Bowring,* 281 U.S. 515, 517, 74 L. ed. 1008, 1010 (retention of jurisdiction in suits between foreigners); accord: *Heredia v. Davies,* (C.C.A. 4, 1926) 12 F. (2d) 500, 501; *The Kanto Maru,* (C.C.A. 9, 1940) 112 F. (2d) 564, 565; see also *The Albert Dumois,* 177 U.S. 240, 255, 44 L.ed. 751, 760 (allowance of interest); *The Lily,* (C.C.A. 9, 1934) 69 F. (2d) 898, 900 (allowance of costs); *The Kermit,* (C.C.A. 9, 1935) 76 F. (2d) 363, 367 (dismissal for laches in prosecution); *Cain v. Alpha S.S. Corp.,* (C.C.A. 2, 1929) 35 F. (2d) 717, 723, aff'd. on other grounds 281 U.S. 642, 74 L.ed. 1086 (denial of motion for new trial); *Alden v. U.S. Shipping Board Emergency Fleet Corp.,* (C.C.A. 5, 1928) 24 F. (2d) 159, 160 (award of damages).

An analogous situation to that here under consideration is presented in the discretion of the trial court to set aside decrees or orders of default as provided in Admiralty Rules 28 and 39. (See discussion, supra p. 10). The exercise of this power has repeatedly been held to be reviewable by the circuit court of appeals only for a clear and plain abuse of discretion. *St. Charles Amusement & Transportation Co. v. Elhardt,* (C.C.A. 8, 1918) 254 Fed. 275, 278, cert. den. 249 U.S. 604, 63 L.ed. 798; *The Barge No. 25,* (C.C.A. 9, 1926) 14 F. (2d) 107, 108; *Cape Fear Towing & Transportation Co. v. Pearsall,* (C.C.A. 4, 1898) 90 Fed. 435, 437; see also *The Gilbert R. Green,* (E.D. N.Y. 1917) 243 Fed. 927; *Scott v. The Young America,* Fed. Cas. No. 12,550, 21 Fed. Cas. 853; *The Oriental,* Fed. Cas. No. 10,569a, 18 Fed. Cas. 804; *The George Prescott,* Fed Cas. No. 5339, 10 Fed. Cas. 222; *Gaines v. Travis,* Fed. Cas. No. 5179, 9 Fed. Cas. 1060.

The circuit court of appeals for the eighth circuit in *St. Charles Amusement & Transportation Co. v. Elhardt,* (C.C.A. 8, 1918) 254 Fed. 275, 277, 278, cert. den. 249 U.S. 604, 63 L.ed. 798, has stated:

> "General admiralty rule 29 (29 Sup. Ct. xlii) provides that the court may in its discretion set aside the default of a defendant and admit him to make answer to the libel at any time before final decree.
>
> "* * * *
>
> "We are therefore satisfied there is no equity in appellant's motion. It was addressed to the sound discretion of the trial court, and that discretion was wisely exercised."

In *Cape Fear Towing & Transportation Co. v. Pearsall,* (C.C.A. 4, 1898) 90 Fed. 435, 437, it is said:

> "It will be observed that, in the first of these rules, upon the application of the defendant, and upon his payment of costs, the court, in its discretion, may set aside the default. On the second of these rules, the court, upon the payment of costs, may rescind the decree, in a suit, made against a defendant on account of his contumacy and default. *So the matter lies in the discretion of the court, and in the exercise of this discretion the court refused the motions made by the defendant below. When a matter is in the discretion of the court, the exercise of that discretion is not reviewable in the appellate court.* * * * This motion to reopen the default having been within the discretion of the court below, its action cannot be reviewed here."

The determination as to whether or not late claims are to be permitted to be filed in a limitation proceeding by Admiralty Rule 51 has been entrusted to the discretion of the district court, and, so far as the circuit court of appeals is concerned, the exercise of this discretion "has the force of law * * * and we are as much bound to observe it as a statute." (Learned Hand, J., in *Galveston Dry Dock & Construction Co. v. Standard Dredging Co.*, (C.C.A. 2, 1930) 40 F.(2d) 442, 444.)

This Court has considered the guarantee of this discretionary power a matter of substance and importance. In *Bowring, Jones & Tidy, Limited, v. Charter Shipping Co., Limited,* (C.C.A. 2, 1929) 33 F.(2d) 280, 281, a libel had been brought in the district court by one foreign corporation against another to recover a general average deposit made in London. The decree of the district court was reversed, the circuit court of appeals stating:

> "* * * It was discretionary with the court below to accept jurisdiction, even though the parties be foreign

corporations. The Belgenland, 114 U. S. 355, 5 S. Ct. 860, 29 L. Ed. 152; The Kaiser Wilhelm der Grosse, (D. C.) 175 F. 215.

"The affidavits show that the witnesses as to the seaworthiness of the vessel are American witnesses. If the bill of lading, as is asserted, contained a Jason clause, the question of the exercise of due diligence to make the vessel seaworthy might be a relevant fact to determine the liability of the vessel for a general average contribution. This the trial judge did not refer to. He placed his decision on the ground that general average was to be determined by the law of the port of discharge. This we think an insufficient reason, in view of the proof as to convenience of witnesses for declining jurisdiction. It was expedient, under all the circumstances, to exercise it. * * *."

This Court granted certiorari and reversed the circuit court of appeals in *Charter Shipping Company, Limited, v. Bowring, Jones & Tidy, Limited,* 281 U. S. 515, 74 L. Ed. 1008, the Chief Justice, then Justice Stone, writing for the Court:

"The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the district court. *The exercise of its discretion may not be disturbed, unless abused.* * * * .

"Even if we assume, as did the court below, that the bills of lading may have modified the liability in general average so as to put in issue the care taken to make the vessel seaworthy before sailing, we cannot say that the District Court improvidently exercised its discretion. * * * *It was for the District Judge to consider the facts appearing and the inferences which he might draw from them, and reach his own conclusion* as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England.

"Reversed."

2. There was no abuse of discretion by the district court.

(a) *The circuit court of appeals found no abuse of discretion.*

The circuit court of appeals did not find that the district court had abused its discretion nor did it so hold (R. 63).

(*b*) *The district court carefully exercised its discretion.*

The decree of the district court (R. 35) refusing respondent leave to file her claim and the record before the court below show a careful, fair and conscientious exercise of discretion by the district court. Although "it was not necessary for the defendants to show specific impairment of their defense, because the law will presume injury from unreasonable delay" (*Hicks v. Bekins Moving & Storage Co.*, (C.C.A. 9, 1940) 115 F. (2d) 406, 409), the district court affirmatively found (R. 37):

> "* * * that by reason of claimants' unexcused delay, laches, and the lapse of time, there has resulted substantial change of conditions, with material and substantial prejudice to petitioners' defense against such late claims; that a war has intervened with consequent restrictions upon communications and access to the Territory of Alaska, where the loss occurred out of which this cause arises, and where some of the necessary evidence and witnesses at any hearing on the merits would have to be obtained; that of the three surviving crew members who were previously available, two would with reasonable probability not be available to petitioners as witnesses if late Answers and Claims were now allowed; * * *."

That court further found that no meritorious excuse or justification was shown by the respondent for an extension

of the time within which to file claim herein (R. 36-37). It appears from the record that the lower court affirmatively found that exercise of its discretion to grant such grace was neither warranted nor equitable (R. 38). A more faithful exercise of discretion than that of the district court is difficult to conceive.

We believe that any abuse of discretion in this matter must be attributed to the circuit court of appeals in reversing the district court upon the fragmentary record brought before it by the respondent. Respondent failed to bring up a record in any way sufficient to show the facts, circumstances and antecedent history and proceedings upon which the lower court made its findings, reached its conclusions, and exercised its discretion. Respondent produced nothing except counsel's unsupported statement to show that the court's findings and action were arbitrary or capricious. Neither does the record brought before the circuit court of appeals by respondent disclose, except as they are summed up in the decree, all the proceedings, statements, admissions, arguments, additions to the record, or the showing made by respective parties at the two-day hearing upon which the district court based its findings, which findings must be accepted unless clearly contrary to the evidence. *Petterson Lighterage & Towing Corp. v. New York Central R. Co.*, (C. C. A. 2, 1942) 126 F.(2d) 992, 995-996; *Johnson v. Andrus*, (C.C.A. 2, 1941) 119 F.(2d) 287, 288; *The Heranger*, (C. C. A. 9, 1939) 101 F.(2d) 953, 957; *The Redwood*, (C.C.A. 9, 1936) 81 F.(2d) 680, 686.

(c) *The district court was not required as a matter of law to permit the filing of respondent's claim.*

(1) Respondent's claim could not be filed *nunc pro tunc.*

The decree of the district court (R. 35) denied respondent leave to file her claim *nunc pro tunc* as of the expiration date of the monition, March 25, 1940, and also denied respondent leave to file her claim as of the date it was presented, July 21, 1942. It is apparent that a reversal of either provision of the decree of the district court extends the time fixed by that court for the filing of claims which we submit for the reasons above set forth is beyond the power of the circuit court of appeals.

There is also an additional and, we believe, equally insuperable obstacle to the entering of any order granting respondent permission to file her claim *nunc pro tunc* as of the expiration date of the monition in that there was no qualified personal representative in existence during the period in which claims might have been filed. Respondent was not appointed Washington administratrix until July 7, 1942 (R. 28) and the district court was powerless to apply the *nunc pro tunc* doctrine, this rule having been established in the same case which governed the previous appeal in this matter (App. i, 127 F. (2d) 648). In *The Princess Sophia,* (W. D. Wash. 1929) 36 F. (2d) 591, 594, aff'd. 61 F. (2d) 339, Judge Neterer refused to enter a *nunc pro tunc* order substituting a subsequently appointed domestic administrator in the claims theretofore filed in the limitation proceeding for the foreign administrator held to be without capacity, stating:

> "*Nunc pro tunc*—now for then—an entry now for something previously done. A decree or order *nunc pro tunc* presupposes a decree or order, but not entered through inadvertence of the court."

See also *Cuebas Y. Arredondo v. Cuebas Y. Arredondo,* 223 U. S. 376, 390, 56 L. ed. 476, 481; *The Bayonne,* 159 U. S. 687, 693, 40 L. ed. 306, 309, *Hammond Hotel & Improvement Co. v. Chicago Title & Trust Co.,* (C. C. A. 7, 1931) 55 F.(2d) 168, 169; *Rardin v. Messick,* (C.C.A. 7, 1935) 78 F.(2d) 643, 645; *Guarantee Trust & Safe Deposit Co. v. Philadelphia R. & N.E.R. Co.,* 160 N.Y. 1, 7, 54 N.E. 575, 577.

In *Smith v. New York Central R. Co.,* 171 N.Y. Supp. 64, a judgment for the plaintiff administratrix in a wrongful death action under the New York statute was reversed on appeal, the court stating:

> "* * * Appellant urges a reversal of the judgment on the ground that plaintiff was not an administratrix when the action was commenced, and we think this contention must be upheld. The cause of action for negligence causing death is, by the precise terms of the statute which authorizes the action, given to the executor or administrator. It is not given to the widow, children, or next of kin, and an action cannot be maintained by them. * * *.
>
> "The plaintiff was not the administratrix when the action was commenced, and no subsequent order can change that fact. As was said in *Guarantee Trust Co. v. P. R. & N. E. R. R.,* 160 N.Y. 1, 7, 54 N. E. 575:
>
> " 'While a court may record an existing fact *nunc pro tunc,* it cannot record a fact as of a prior date when it did not then exist.'
>
> "* * * Plaintiff's counsel, instead of beginning another action after the appointment of the administratrix, saw fit to rest his client's rights on the uncertain proposition that an order of a surrogate can effectively declare that the plaintiff was an administratrix when

she was not. Fortunately for her, the time to assert her rights has not yet expired."

(2) The question here presented was not involved in the former decision of the court below.

The majority opinion in the court below urges as a ground for its decision that the district court "disregarded the spirit" of its mandate in the former appeal in this matter (*The O. M. Arnold*, 127 F. (2d) 648, App. i). As that opinion sets forth the trial court had sustained exceptions to claims filed by the Oregon administrators and an order dismissing those claims had been entered. The court below affirmed this dismissal, stating:

> "Claimants contend here that they should be entitled to properly present their claims but that they would be prevented from doing so because the order is res judicata. While it seems clear that the order would not prevent other parties from filing claims (that is personal representatives appointed in Washington) we see no reason why the order appealed from could not state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington. The order is so modified, and as modified, is
> "Affirmed."

The dismissal of the claims of the Oregon administrators was the only issue then before that court and it might with equal propriety and with equal force and effect upon any claims subsequently presented by respondent or any other person not then before the court have expressed the hope that no exceptions be sustained. Judge Haney, dissenting in the court below, states (R. 65):

> "FIRST. One ground for the decision is found in our former opinion which I wrote. If that opinion is subject

to the interpretation given it by the majority, it is not what I intended to say. I had no intention of pre-litigating a point which might arise in future proceedings. Furthermore, as can be seen in a casual reference to that opinion, the only point raised and argued was that the decree against the Oregon representatives might be res judicata as against claims filed by Washington representatives. We ordered a modification of the decree so as to provide that the principle of res judicata would not prevent the filing of claims by Washington representatives. The majority now say that we also decided on the first appeal that the monition of the court below and any statute of limitations would not bar the filing of claims by Washington representatives. Not only was that point not decided, but it was not even mentioned."

(3) After voluntarily electing to proceed on an erroneous theory of law with full knowledge of the consequences claimants are not entitled as a matter of right to proceed on another.

If the decision of the circuit court of appeals were to be rested upon an abuse of discretion by the district court, it would have to rest upon the bald proposition that there is an abuse of discretion by the district court as a matter of law where death claims have been presented by a foreign administrator in a limitation proceeding which are subsequently dismissed for want of capacity and the district court refuses to permit the filing of late claims presented by a domestic administrator, even though it appears that the beneficiaries of the claims and their counsel had notice that the capacity of the foreign administrators was challenged, and had ample opportunity to cure the defect but voluntarily elected to rest their rights upon the claims of the foreign administrators and appealed from the dismissal of such claims.

This Court has held that a claimant who elects to proceed against the carrier in a state court and fails to file claims in the limitation proceeding with full knowledge of the same thereby effectively loses his claim against the carrier. *Providence and New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 27 L. ed. 1038.

A situation substantially identical with that here presented was involved in the case of *In re Eastern Dredging Co.*, (D. C. Mass. 1907) 159 Fed. 549, 551. There claimants, with full knowledge of the proceedings, had failed to file claims in the proceedings for limitation of liability filed by owners of the Scow No. 34, but elected to proceed with their claims against the owners of the ferryboat involved in the collision with the scow. The court refused to allow the filing of the late claims presented by claimants, stating:

> "In a proper case, the court may and will allow damage claims to be presented after the time fixed by the monition has expired. There was such an exercise of the discretion of the court in favor of these petitioners in the proceedings upon the petition filed by the owner of the ferryboat. See the opinion in that case, dated December 18, 1906. There was such an exercise of the discretion of the court in *The Argus* (D. C.) 100 Fed. 143. But while a damage claimant who has not had a fair opportunity to appear may be allowed to file his claim late, as, for example, when through force of circumstances it has not been reasonably possible for knowledge of the proceedings to reach him, or when, though he has had notice, his appearance has been delayed through accident or mistake, and while this may be more readily permitted so long as none of the steps have been taken which are based on the assumption that all parties are in court who wish to be heard, these claimants have no such claim upon the indulgence of the court. They had due notice of the monition, and

> deliberately elected not to present their claims in these proceedings, but to rely upon their rights in proceedings elsewhere."

It is said in *Dowdell v. United States District Court,* (C. C.A. 9, 1905) 139 Fed. 444, 445:

> "There is nothing in any of the cases cited by counsel that the proceedings shall, after the court has obtained jurisdiction over the parties appearing therein, be kept open, or, in other words, suspended, to await the appearance of other claimants, who from any cause have failed to appear therein. Where a monition and publication is made according to the rules and practice in admiralty proceedings, it becomes notice to 'all persons' having any claims, whether they receive actual notice thereof or not, and, if they fail to appear within the time designated, they are liable to lose the opportunity of presenting their claims in that proceeding or in any other."

Assuming that claimants mistook what the court below characterizes as "the plain law on the subject," there is no rule of law which grants respondent leave to file late claims after exhausting what proved to be a fruitless attempt to obtain satisfaction of her claims. *Providence and New York Steamship Co. v. Hill Manufacturing Co.,* 109 U.S. 578, 27 L. ed. 1038; *In re Eastern Dredging Co.,* (D.C. Mass. 1907) 159 Fed. 549. But here the respondent as found by the district court "did not mistake the law — she ignored it." (Haney, J., dissenting, R. 67.) Where there is disregard of established rules of law "justice is not promoted in its orderly administration when such conduct is condoned." (Stone, J., and Cardozo, J., dissenting, *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 488, 77 L. ed. 439, 447.)

It is respectfully urged that the questions presented involving a proper construction of Admiralty Rule 51 and the scope of the powers of the district courts and the circuit courts of appeals thereunder are of such importance that this Court should assume jurisdiction.

WHEREFORE, It is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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